Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	
Communications Assistance for Law Enforcement Act	**RM-10865**
Joint Petition for Expedited Rulemaking, filed by United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration	

To: Office of Engineering and Technology

SUMMARY OF COMMENTS OF ISP CALEA COALITION

The ISP CALEA Coalition consists of Internet service providers and online service providers that have demonstrated their commitment to assisting law enforcement in many concrete ways. Its members have committed substantial resources to providing law enforcement agencies with technical assistance and training and they respond to tens of thousands of law enforcement requests each year. These requests are almost exclusively for online account and e-mail communications, not wiretaps. Indeed, for a typical ISP, such requests outnumber traditional Title III and pen register orders by several orders of magnitude. Given the relatively small number of traditional intercept orders served on ISPs and online service providers, there is no policy basis for extending CALEA to cover their services.

Nor is there any legal basis for doing so. The Petition seeks to overturn the balance struck by Congress between law enforcement and continued innovation. In essence, it asks the Commission to adopt a much broader version of CALEA – a version that Congress has already expressly rejected. (Section II)

Congress's intent is clear. CALEA does not apply to "information services," and that exclusion should be interpreted broadly. The core services provided by the companies in the ISP CALEA Coalition – including online services; e-mail; and text, voice and video messaging – are all classic information services. The Commission should reaffirm the scope of the information services exception. (Section III)

Petitioners seek a finding that all "broadband access" and "broadband telephony" services are covered by CALEA, arguing that "telecommunications carrier" has a broader meaning under CALEA than under the Communications Act. The Commission has concluded under the Communications Act that broadband access services and most, if not all, broadband telephony services are information services, and Petitioners do not establish that a significantly different result is appropriate under CALEA. With respect to broadband access, the Petition obscures the crucial distinction under the Communications Act between the underlying link over which the broadband access service travels and the various higher-level information services that ride on that link.

More specifically, the Petition fails to establish a legal basis for regulating broadband access and broadband telephony services under CALEA. The Petition fails to meet the one statutory basis for covering new technologies because it cannot demonstrate that either broadband access or broadband telephony now replaces "a substantial portion of the local telephone exchange service." And the Petition's effort to define "switching" to include all tasks performed by routers and servers on the Internet would effectively read the information services exception out of the law. The Petition also largely ignores the complex factual issues that are critical to analysis of broadband access and broadband telephony services.

Because of the significant legal and factual issues regarding treatment of broadband access and broadband telephony services, the Commission must decide the applicability of CALEA to these services only through a notice and comment rulemaking, and not a declaratory ruling as the Petition requests. Once the Commission has clarified in a rulemaking which broadband access and broadband telephony services (if any) are subject to CALEA, industry will have the task of defining safe harbor compliance standards for the services. (Section IV)

The Petition also requests the Commission to establish rules and procedures for application of CALEA to future services, and goes so far as to suggest a pre-approval process for new services. This astonishing proposal would cripple innovation on the Internet, quite probably ensuring that new services would always be implemented outside the United States and well beyond the reach of this new regulatory regime. The proposal contradicts Congress's plain intent and should be rejected. No rulemaking on these issues is appropriate. (Section V)

Finally, the Petition requests that the Commission issue strict rules on CALEA enforcement, including a forced march to CALEA packet mode "compliance" by June 2005. This request is contrary to the clear allocation of CALEA enforcement authority to the federal courts, and the specific enumeration of Commission powers – which do not include enforcement of CALEA. Rulemaking on these issues is also not justified. (Section VI)

Table of Contents

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	
Communications Assistance for Law Enforcement Act	**RM-10865**
Joint Petition for Expedited Rulemaking, filed by United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration	

To: Office of Engineering and Technology

COMMENTS OF ISP CALEA COALITION

These comments are submitted by the ISP CALEA Coalition, a group of large Internet service providers ("ISPs") and online service providers, in response to the Joint Petition for Expedited Rulemaking ("Petition") filed by the United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration ("Petitioners") to address certain CALEA implementation issues,[1] and pursuant to the Commission's Public Notice on the Petition[2] and Section 1.405 of the Commission's Rules.[3] The ISP CALEA Coalition includes America Online, BellSouth, Microsoft, MCI, and Yahoo!

---

[1] *See* Joint Petition for Expedited Rulemaking of United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration, RM-10865 (filed March 10, 2004) ("*Petition*").

[2] Public Notice, DA 04-700 (Mar. 12, 2004).

[3] 47 C.F.R. § 1.405.

The ISP CALEA Coalition recognizes that Petitioners have a great and legitimate interest in accessing communications content and call-identifying information in order to investigate and prevent crime (including the serious threat of terrorism), and its members have implemented extensive measures to ensure that law enforcement has the capabilities it needs to perform its mission within the bounds of applicable law. But this Petition goes well beyond the law. As discussed below, virtually every aspect of the Petition is foreclosed by the plain language and clearly expressed intent of the Communications Assistance for Law Enforcement Act of 1994 ("CALEA").[4]

I. INTRODUCTION AND BACKGROUND

All of the companies in the ISP CALEA Coalition have committed substantial resources to assisting law enforcement with intercepts and other evidence gathering pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III")[5] and the Electronic Communications Privacy Act ("ECPA").[6] Their efforts include responding to tens of thousands of requests each year for information regarding online accounts and e-mail communications. Among them, these five ISPs alone have dozens of employees dedicated to serving law enforcement's investigative requirements – often at no cost whatsoever to the investigating agency. ISP employees make themselves available 24 hours a day, seven days a week, and often respond to law enforcement requests in the middle of the night – willingly and without complaint – when a law enforcement emergency requires quick action.

---

[4] Pub. L. 103-414, 108 Stat. 4279 (1994).

[5] Pub. L. 90-351, 82 Stat. 212 (1968) (codified, as amended, at 18 U.S.C. §§ 2510 *et seq.*).

[6] Pub. L. 99-508, 100 Stat. 1848 (1986) (codified, as amended, at 18 U.S.C. §§ 2701 *et seq.*, 3121 *et seq.*)

Members of the ISP CALEA Coalition have engaged Petitioners in an ongoing partnership to provide training and technical assistance to ensure that law enforcement is prepared to meet the demands of investigating and prosecuting computer and Internet crimes. Member companies provide extensive training and expert assistance to law enforcement agencies, including through participation in training at the National Advocacy Center, the Federal Law Enforcement Training Center, and countless other federal, state and local training activities. They have been integral members of the Electronic Crimes Task Forces throughout the country established by the United States Secret Service, and the FBI's Infraguard. Members have produced and distributed training material for law enforcement agencies on the intricacies of computer investigations and digital evidence, at their own expense. They do this not because they are forced to, but because ISPs are responsible corporate citizens, committed to meeting law enforcement's requirements, within the bounds of the law.

Members of the ISP CALEA Coalition have also worked with law enforcement agencies to develop new technical capabilities and procedures to facilitate gathering evidence about lawbreakers using their networks. This has transformed the investigation of many crimes. Unlike telephone services, for which information is lost if not acquired on a real-time basis, ISP services allow law enforcement agencies to obtain stored communications and transactional records, which provide evidence of criminal and terrorist activity that has produced a virtual revolution in how crimes are investigated and solved.

Law enforcement relies far more heavily on these capabilities than on traditional wiretap orders in obtaining information from ISPs. Of the tens of thousands of law enforcement requests that members of the ISP CALEA Coalition have honored each year, only a handful have been traditional Title III intercept orders. Indeed, few ISPs have received more than two or three full

Title III orders in the past year. The remainder of law enforcement requests – well over twenty thousand – are non-intercept requests for other forms of information that are routinely available from ISPs but do not fall into the traditional wiretap categories.

II. THE PETITION IGNORES THE PLAIN LANGUAGE OF CALEA TO EXTEND THE REACH OF THE STATUTE BEYOND THAT ENVISIONED BY CONGRESS

In CALEA, Congress struck a careful balance among "three key policies: (1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies."[7] The Petition overturns this balance, exalting law enforcement's interest in intercept capabilities above all of the other objectives embodied in CALEA.

A. CALEA Provides Petitioners with Narrowly Focused Intercept Capabilities for Specified Telecommunications Services

CALEA addressed the interests of law enforcement by mandating carefully focused intercept capabilities for providers of common carrier telecommunications services (including commercial wireless services), and certain other electronic communications services that replace local exchange service. At the same time, CALEA preserved the *status quo* for Internet services and other "information services," by explicitly excluding them from the coverage of CALEA. Thus, these services remain free to develop without having to implement required network modifications to assist law enforcement, but the obligations of Title III and ECPA continue to apply. In this way, Congress provided that telecommunications carriers providing traditional local telephone service must include appropriate intercept capabilities. So must

[7] H.R. Rep. No. 103-827, 1994 U.S.C.C.A.N. 3489, 3493 (1994) (emphasis added) ("*CALEA Legislative History*").

telecommunications services that replace the traditional public switched network (including wireless service, and certain other local telecommunications services provided to a "substantial portion" of the public). For "information services," the assistance requirements of Title III and ECPA mean that service providers must cooperate with law enforcement by turning over information from their networks; the difference is that, in order to promote continued technological innovation, their networks need not be redesigned to provide particular intercept capabilities.

The language and structure of CALEA demonstrate at every turn Congress's commitment to protecting innovation from law enforcement regulation. First, Congress exempted information services from CALEA, not once, but twice.[8] Second, it did not allow the extension of CALEA's obligations to non-telecommunications carriers using new technologies until the new technologies had achieved substantial market penetration – and even then only after a public interest determination by the Commission.[9] Third, it prohibited law enforcement from requiring specific system designs.[10] Fourth, it stated expressly that law enforcement could not exercise a veto over new services.[11] Fifth, it allowed industry to write standards for how to comply with CALEA, subject only to a later challenge by law enforcement.[12] Sixth, even after standards are written, Congress provided, innovators remain entirely free to adopt a different solution of their own choosing. Seventh, innovators may deploy their technologies freely even if the technologies

[8] 47 U.S.C. §§ 1001(8)(C)(i), 1002(b)(2)(a).

[9] 47 U.S.C. § 1001(8)(B)(ii).

[10] 47 U.S.C. § 1002(b)(1)(A).

[11] 47 U.S.C. § 1002(b)(1)(B).

[12] 47 U.S.C. § 1006(a), (b).

cannot meet the capability standards of CALEA; Congress gave companies deploying inaccessible technologies an absolute defence against enforcement if CALEA capability is not "reasonably achievable."[13]

Even in traditional telecommunications, Congress did not offer law enforcement a guarantee that every conversation would always be subject to wiretap. Private networks, including private branch exchanges ("PBXs") that are widely deployed by businesses, are excluded.[14] Likewise for encryption, which can defeat any wiretap, a carrier is only obliged to decrypt the communications if the carrier provided the encryption and possesses the key.[15]

Nor did Congress offer an assurance that future wiretaps must continue to be as convenient to law enforcement as they were in 1994. When a mobile subscriber leaves one carrier's network and roams to another's, CALEA does not require that the wiretap follow the target. The first carrier need only provide the name of the new carrier; law enforcement must do the legwork of locating and serving the new carrier, even though that means some intercepts will be lost.[16] And call identifying information that was available in response to a traditional pen register order need not be duplicated in mobile or other contexts; it must be provided only if it is "reasonably available."[17]

Finally, Congress refused to create a regulatory system that depends on getting prior clearance from regulators before new technologies are deployed. Instead, it set a few simple

---

[13] 47 U.S.C. § 1008(b).

[14] 47 U.S.C. § 1002(b)(2)(B).

[15] 47 U.S.C. § 1002(b)(3).

[16] 47 U.S.C. § 1002(d).

[17] 47 U.S.C. § 1002(a)(2).

requirements mandating only the results that telecommunications carriers must achieve, not the methods they must use. Rather than obtain prior clearance, carriers may deploy the technologies as they see fit, subject only to the risk of a civil enforcement action by law enforcement.[18] And the law enforcement agencies that bring such suits must demonstrate both that alternative technologies for obtaining the same information are not reasonably available and that the compliance by the carrier was reasonably achievable.[19]

The legislative history is equally emphatic. In drafting CALEA, Congress specifically rejected earlier FBI proposals that called for broad coverage of all providers of electronic communications and a prior regulatory clearance of new services, stating that the proposals were "not practical" and not "justified to meet any law enforcement need."[20] Congress chose instead

---

[18] 47 U.S.C. § 1007.

[19] 47 U.S.C. § 1007(a).

[20] *CALEA Legislative History* at 3498 ("Earlier digital telephony proposals covered all providers of electronic communications services, which meant every business and institution in the country. That broad approach was not practical. Nor was it justified to meet any law enforcement need."). *See also Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: Joint Hearings on H.R. 4922 and S. 2375 Before the Subcomm. on Tech. and the Law of the Senate Comm. on the Judiciary and the House Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 103d Cong. 49 (March 18, 1994) ("*March 18, 1994 Hearing*") (colloquoy between Sen. Leahy and Dir. Freeh):

Sen. Leahy: Wouldn't the PBX exception be a big hole in the proposal? Why would they be exempted?

Dir. Freeh: . . . You are correct. We are excluding them, and for a couple of reasons: one, to narrow the impact and focus of the legislation. We could have incorporated it in there, as we did in the proposal two years ago, which was rejected out of hand. I think what we did in the interim is we made a concerted effort to narrow the impact of our focus and pick up where we think we will get the majority of criminal operatives. We are losing that, but that is a concession we are willing to make to narrow the package . . . . In a perfect world, [certain "other portions of the industry"] would be in there, but we want to narrow the focus of this so we can get the greatest support by the Congress and the committees, because the last time we were here, we were told specifically that it was too broad and it had to be narrowed and focused. So we picked out where we think we have the greatest vulnerability.

to "greatly narrow[]" the scope of the proposals to cover only "telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders,"[21] and to specifically exclude "information services, such as Internet service providers or services such as Prodigy and America-On-Line."[22]

B. The Commission Is Not Empowered To Rewrite CALEA

The Petition proposes that the Commission simply ignore these limitations and impose a regulatory scheme that Congress rejected. The Petition requests that the Commission find that all providers of "broadband access" and "broadband telephony" services – regardless of their technology or market penetration – are covered by CALEA.[23] Even more striking, the Petition implies that certain "information services" like e-mail are potentially subject to CALEA,[24] and

---

[21] *Id*. ("It is also important from a privacy standpoint to recognize that the scope of the legislation has been greatly narrowed. The only entities required to comply with [CALEA] requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders."). *See March 18, 1994 Hearing* at 7 (statement of Louis J. Freeh) ("[T]he legislation is narrowly focused on where the vast majority of our problems exist: the networks of common carriers, a segment of the industry which historically has been subject to regulation."); *id.* at 202 (August 11, 1994) ("*August 11, 1994 Hearing*") (colloquoy between Sen. Pressler and Dir. Freeh):

Sen. Pressler: So what we are looking for is strictly telephone, what is said over a telephone?

Dir. Freeh: That is the way I understand it, yes, sir.

[22] *Id*. ("Also excluded from coverage are all information services, such as Internet service providers or services such as Prodigy and America-On-Line."). *See also August 11, 1994 Hearing* at 200 (Testimony of Louis J. Freeh) ("There is always going to be and perhaps increasing because of the technology developments, a range of criminal activity and a particular type of criminal actor who will be immune from the best-designed and best-built system.")

[23] *Petition* at 15-32.

[24] *Id.* at 27.

proposes a technology pre-approval process that would subject market introduction of new services to huge uncertainty and delay .[25]

An agency lacks discretion to adopt a rule or decide an issue in a manner that contravenes the unambiguous meaning of a statute.[26] The meaning of a statute is determined using the "traditional tools of statutory construction,"[27] including examination of the statute's text, legislative history, and structure, as well as its purpose. [28] However, the Petition effectively asks the Commission to reject these traditional tools of construction in favor of a reading of CALEA that is inconsistent with the statutory language and that has been specifically rejected by Congress.

III. CALEA DOES NOT APPLY TO INFORMATION SERVICES, INCLUDING THE CORE SERVICES OF THE ISP CALEA COALITION

A. Congress Expressly Exempted Information Services From the Requirements of CALEA

Congress's intent to exclude information services completely from the scope of CALEA could not have been more clear. Information services are exempted from CALEA not once, but twice. First, the definition of "telecommunications carrier" in CALEA specifically excludes

---

[25] *Id.* at 53-54.

[26] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *United States Telecom Ass'n v. FCC*, __ F.3d __ (D.C. Cir. 2004), 2004 WL 374262 (reversing agency interpretation under *Chevron* step one); *MPAA v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) (same); *AT&T Corporation v. FCC*, 292 F.3d 808 (D.C. Cir. 2002) (same); *Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (same); *National Public Radio Inc. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (same); *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995) (same).

[27] *Chevron*, 467 U.S. at 843 n.9

[28] *Chevron*, 467 U.S. at 843 n.9; *Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

"persons or entities in so far as they are engaged in providing information services."[29] Second, section 103(b)(2)(A) provides that CALEA's intercept capability requirements "do not apply to … information services."[30]

Congress clearly articulated the broad scope of "information services" in CALEA and its legislative history. The statutory text provides that "information services":

> (A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and
>
> (B) includes –
>
> > (i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;
> >
> > (ii) electronic publishing; and
> >
> > (iii) electronic messaging services … .[31]

"Electronic messaging services" are in turn defined to mean:

> software-based services that enable the sharing of data, images, sound, writing or other information among computing devices controlled by the senders or recipients of the messages.[32]

This extraordinarily broad definition covers the many services provided by the companies in the ISP CALEA Coalition, as discussed in more detail in the next section. In the legislative history, Congress made it clear that "Internet service providers," "electronic mail providers," and "online

---

[29] 47 U.S.C. § 1001(8)(C)(i).

[30] 47 U.S.C. § 1002(b)(2).

[31] 47 U.S.C. § 1001(6)(B).

[32] 47 U.S.C. § 1001(4).

services providers, such as Compuserve, Prodigy, America-On-Line or Mead Data" are all information service providers.[33]

More generally, Congress indicated that the information services exception under CALEA should be construed broadly, recognizing the ongoing evolution of such services:

> It is the Committee's intention not to limit the definition of "information services" to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of "information services." By including such software-based electronic messaging services within the definition of information services, they are excluded from compliance with the requirements of [CALEA].[34]

Congress was well aware when it passed CALEA of the rapid evolution of Internet services, and it intended to permit that evolution to continue unimpeded.[35]

Under the plain language and intent of CALEA, the core ISP services provided by the companies in the ISP CALEA Coalition – including online services, e-mail, and text, voice and video messaging – are clearly information services that are outside the scope of the statute. In its rulemaking on CALEA, the Commission should affirm the broad scope of the information services exception.

1. Online Services

Online services are typically provided over the World Wide Web or through an ISP's proprietary interface. Such services typically include search and directory functions as well as content – some of which may be provided by the ISP, some by traditional publishers, and much

---

[33] *CALEA Legislative History* at 3500.

[34] *Id.* at 3501.

[35] *Id.* at 3497 ("Millions of people now have electronic mail addresses. Business, nonprofit organizations and political groups conduct their work over the Internet. Individuals maintain a wide range of relationships online."). *See March 18, 1994 Hearing* at 65-97 (testimony of Jerry Berman and Ron Plesser, on behalf of Electronic Frontier Foundation); *August 11, 1994 Hearing* at 157-65 (testimony of Jerry Berman, Electronic Frontier Foundation).

by individuals through newsgroups and other postings, weblogs, chatrooms and other discussion groups, personal advertisements, and the like. ISP online services are often interactive, offering the ability, for example, to collaboratively edit documents, initiate chat regarding posted material, share photographs and other files, or play games with individuals located on the other side of the world.

There is little doubt that such services are "information services" under CALEA. They clearly offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" and provide sophisticated tools to allow "customer[s] to retrieve stored information from, or file information for storage in, information storage facilities"[36] – including the vast array of information resources on the Internet.[37] Indeed, the Petition concedes that "'information services' includes online services and Web sites such as America Online … ."[38]

2. E-Mail

There is ambiguity regarding Petitioners' position on whether e-mail systems are subject to CALEA. After the Petition was filed, the FBI clarified on the AskCALEA website that "[o]ther online services, including instant messaging, e-mail, and visits to websites, would not be covered" by CALEA.[39] However, the Petition itself argues that "the transmission of [data

[36] 47 U.S.C. § 1001(6)(B).

[37] *See also Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11537-38 ¶ 76 (1998) ("*Stevens Report*") (determining that typical World Wide Web services bear the characteristics of information services).

[38] *Petition* at 27.

[39] Joint Petition for Expedited Rulemaking, Frequently Misunderstood Questions http://www.askcalea.org/jper.html (last visited Apr. 1, 2004) ("AskCALEA FAQ").

communications such as] an E-mail message to an enhanced service provider that maintains the E-mail service" is covered by CALEA.[40]

In fact, e-mail plainly meets the definition of "electronic messaging services" under CALEA, and it therefore is an information service. The legislative history of CALEA could not confirm this more clearly, stating that "information services" include both "e-mail service providers"[41] and services based on "messaging software [including] … Lotus Notes, … Microsoft Exchange Server, … CC: Mail, MCI Mail, [and] Microsoft Mail."[42] Not surprisingly, the Commission has also concluded that e-mail is an "information service" under the Communications Act.[43]

3. Text, Voice and Video Messaging

Text, voice and video messaging services are also clearly "information services" under CALEA. They fall squarely within the definition of "electronic messaging services" as "software-based services that enable the sharing of data, images, sound, writing or other information among computing devices … ."[44] This is confirmed by the legislative history of CALEA which provides that "'information services' includes messaging services offered

---

[40] In making this assertion, Petitioners rely on the entirely different proposition in the CALEA legislative history that the *transmission* of *bits* comprising an e-mail could be covered by CALEA. *CALEA Legislative History* at 3503.

[41] *Id.* at 3500 ("The definition of telecommunications carrier does not include persons or entities to the extent they are engaged in providing information services, such as electronic mail providers. . .").

[42] *Id.* at 3501.

[43] *See*, *e.g.*, *Stevens Report* at ¶ 78.

[44] 47 U.S.C. § 1001(4).

through software such as groupware and enterprise or personal messaging software . . . (including but not limited to multimedia software)."[45]

To the extent that Petitioners are asserting that software-based voice IM or chat services are subject to CALEA, such an assertion would be directly inconsistent with the statute, since "electronic messaging services" is defined to include services for sharing of "sound." This conclusion is reinforced by the Commission's recent decision on pulver.com's Free World Dialup ("FWD") service, in which a peer-to-peer, software-based Internet Protocol ("IP") voice service was declared to be an unregulated "information service" under the Communications Act.[46]

IV. BROADBAND ACCESS AND MOST, IF NOT ALL, BROADBAND TELEPHONY SERVICES ARE INFORMATION SERVICES

The primary focus of the Petition is on "broadband access" and "broadband telephony" services. Petitioners seek a Commission finding that all such services are covered by CALEA.[47] Such a blanket conclusion is unwarranted.

The Petition relies heavily on the argument that "CALEA's definition of 'telecommunications carrier' sweeps more broadly than the corresponding definition in the Communications Act."[48] Examined closely, Petitioners' arguments for widely divergent jurisprudence under CALEA and the Communications Act are unpersuasive. To the extent there are differences between the regulatory scope of the two statutes, the Petition's request for blanket

---

[45] *CALEA Legislative History* at 3501.

[46] *See Pulver.com's Free World Dialup*, FCC 04-27, Memorandum Opinion and Order, WC Docket No. 03-45, at ¶¶ 11-14 (Feb. 19, 2004) ("*Pulver.com Order*").

[47] *Petition* at 15-32.

[48] *Id.* at 11.

treatment of these services obscures an extremely complex factual landscape that requires careful analysis under CALEA. In particular, these legal and factual issues make it inappropriate for the Commission to address the Petition's requests by a declaratory ruling rather than a rulemaking.

A. CALEA and the Communications Act Must Be Interpreted Consistently

Applying CALEA to broadband access and broadband telephony would be inconsistent with the Commission's decisions under the Communications Act that many such services are information services. In the *Wireline Broadband NPRM*,[49] the Commission provisionally concluded that wireline broadband access services are information services, even when an entity provides access over its own transmission facilities.[50] Moreover, as the Commission explained in the *CALEA Second Report and Order*, "[w]here facilities are used to provide both telecommunications and information services, . . . such joint use facilities are subject to CALEA in order to ensure the ability to surveil the telecommunications service" but not the information service. Likewise, in the *Pulver.com Order*, the Commission found that the software-based broadband telephony services of pulver.com to be information services.[51] And in the *IP-Enabled*

[49] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, (FCC 02-42) CC Docket No. 02-33 (Feb. 15, 2002) ("*Wireline Broadband NPRM*").

[50] *Id.* at ¶ 3 ("The Commission tentatively concludes that when an entity provides wireline broadband Internet access service over its own transmission facilities, this service, too, is an information service under the Act."). Similarly, in its *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*"Cable Modem Declaratory Ruling"*), the Commission concluded that "cable modem service as currently provided is an interstate information service." *Id.* at 4819; *but see Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

[51] *Pulver.com Order*, at ¶¶ 1-2.

Services NPRM,[52] the Commission is considering whether other IP-based voice services are information services.[53]

The CALEA definition of "information service" is virtually identical to the definition of the same term in section 3(20) of the Communications Act.[54] In the *CALEA Second Report and Order*,[55] the Commission stated that it "expect[s] in virtually all cases that the definitions of the two Acts will produce the same results."[56] Accordingly, the Commission must in this proceeding give significant weight to its existing jurisprudence under the Communications Act.

The Petition raises a particularly significant issue in this area in its treatment of broadband access service – by obscuring (apparently intentionally) the distinction between the underlying link (*e.g.*, DSL or cable) over which the broadband access service travels and the various higher-level information services (*e.g.*, Internet connectivity, domain name services, online and messaging services, etc.) that ride on that link. Regardless of the treatment of the link, the information services are plainly not covered by CALEA. The statute expressly provides

---

[52] FCC 04-28, WC Dkt. No. 04-36 (rel. Mar. 10, 2004).

[53] *Id.* at ¶¶ 42-44.

[54] Under the Communications Act, "information service" is defined as:

> the offering of the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20). This definition reproduces essentially verbatim sections 102(6)(A), 102(6)(B)(ii) and 102(6)(C) of the CALEA definition. Indeed, the CALEA definition is arguably broader, because it also explicitly includes "electronic messaging services" within the definition of "information services."

[55] 15 FCC Rcd 7105 (1999) ("*CALEA Second Report and Order*").

[56] *Id.* at 7112.

that "[t]he term 'telecommunications carrier' … does not include … persons or entities insofar as they are engaged in providing information services."[57] This result is entirely consistent with the treatment of such services under the Communications Act.[58] By obscuring this distinction, Petitioners attempt to bootstrap access pursuant to CALEA to the packet stream (as is provided by J-STD-025-A) into a requirement that a wide variety of call-identifying information be provided for broadband access services that are clearly exempt information services.[59] As discussed in more detail section IV.D below, this approach is plainly inconsistent with CALEA.

More generally, a reasoned analysis of the applicability of CALEA to broadband access and broadband telephony must focus on the bases in the statutory text for an assertion that the definition of "telecommunications carrier" is broader under CALEA than under the Communications Act. The Petition asserts two primary textual bases for such a distinction – (1) the inclusion of "switching" in the definition of "telecommunications carrier" under CALEA, and (2) the power of the Commission to apply CALEA to services that replace "a substantial

---

[57] 47 U.S.C. § 1001(8)(C)(ii).

[58] While there is continuing debate about whether the telecommunications component of broadband access is subject to separate regulation under the Communications Act, *compare Cable Modem Declaratory Ruling with Brand X, supra,* and *AT&T v. Portland*, 216 F.3d 871 (9th Cir. 2000), there is no debate that a telecommunications component exists. *See Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823 ¶ 39; *see also Wireline Broadband NPRM*, at 3029 ¶ 17. It is also established that Digital Subscriber Line ("DSL") is a distinct service tariffed under the Communications Act. *See In the Matter of GTE Tel. Operating Cos.; GTOC Tariff No.1*, Memorandum Opinion and Order, 13 FCC Rcd. 22466 (1998) ("*GTE DSL Order*"); *In the Matter of Bell Atlantic Tel. Cos., Bell Atlantic Tariff No.1, et al.*, Memorandum Opinion and Order, 13 FCC Rcd 23667 (1998) ("*Bell DSL Order*").

[59] Even under the Communications Act, the Commission was careful not to bootstrap the tariffing of DSL service into regulation of the IP-based information services provided over the DSL connection. The tariffed DSL service is never described in terms of IP routing or services, but only in terms of a network interface device, splitter, modem, DSLAM and a "connection point" (typically a frame relay or Asynchronous Transfer Mode network). *GTE DSL Order* at 22470-71 ¶ 8; *Bell DSL Order* at 23670-72 ¶¶ 6-10.

portion of the local telephone exchange service" – and three minor bases.[60] These arguments, considered below, do not establish that broadband access and broadband telephony services are generally subject to CALEA.

1. Inclusion of "Switching" in the Definition of "Telecommunications Carrier" Does Not Apply to Packet Switching That Is Used to Route Information Services

Petitioners suggests that the CALEA definition of "telecommunications carrier" is broader than under the Communications Act because the definition includes the word "switching." "Switching," Petitioners believe, "includes not only circuit-mode switching, but also packet-mode switching, which is provided by servers and routers."[61] This is an overly broad reading of the term that is directly inconsistent with the information services exception of CALEA.

Virtually every information service is based on the building blocks of computer processing (typically performed by a server) and/or the routing of Internet Protocol data (typically performed by a router). Use of a server or router simply cannot be sufficient to establish that an online service is a telecommunications service. As discussed above, Petitioners themselves acknowledge that ISP online services and e-mail services are not subject to CALEA – and these services require both servers and routers. Indeed, Petitioners seem to argue that switching includes any processing of Internet *content*, even where there is no recognizable link between such processing and the "narrowly focused" intercept capabilities that Congress mandated in CALEA. Quite simply (and obviously), the arguments of Petitioners regarding "switching" prove far too much.

---

[60] *Petition* at 11-14.

[61] *Id.* at 12.

The term "switching" in CALEA should be read in a fashion that is consistent with the rest of the statute, including the definition of "information services."[62] That is, the classification of the service for which servers and routers are being used must be considered. If used to provide an "information service" (*e.g.* Internet services), then servers and routers are not subject to CALEA. Indeed, the definition of "information services" in CALEA states that information services are provided "via telecommunications,"[63] making clear that some element of transmission or switching will inevitably be involved in the provision of an information service. But the mere presence of a server or router does not convert an information service into a telecommunications service.[64]

2. Broadband Access and Broadband Telephony Have Not Replaced a Substantial Portion of the Local Telephone Exchange Service

Petitioners also rely heavily on section 102(8)(B)(ii) of CALEA, which provides that "telecommunications carrier" includes:

> a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a *replacement for a substantial portion of the local telephone exchange service* and that it is in the *public interest to deem such a person or entity* to be a telecommunications carrier for purposes of this title.[65]

---

[62] *See Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (noting that the rule that statutes *in pari materia* should be construed together "is…a logical extension of the principle that individual sections of a single statute should be construed together"); *MPAA v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("Statutory provisions *in pari materia* normally are construed together to discern their meaning.").

[63] 47 U.S.C. § 1001(6).

[64] Similarly, under the Communications Act, the mere presence of the telecommunications component does not convert an information service into a telecommunications service. *See Stevens Report* at ¶ 788-790; *Cable Modem Declaratory Ruling* at ¶ 40.

[65] 46 U.S.C. § 1001(8)(B)(ii) (emphasis added).

As an initial matter, this provision does not apply to services that fall within the definition of "information services" under CALEA – *e.g.*, voice services based on instant messaging software – since providers of information services are explicitly excluded from the definition of "telecommunications carrier."[66]

Where it is applicable, the test for expanding the definition of "telecommunications carrier" under section 102(B)(ii) has two prongs – a "substantial replacement" test and a "public interest" test. On the "substantial replacement" prong, the Commission would need to conclude both (1) that a particular service replaces local telephone exchange service and (2) that such replacement is "substantial." On the first point, for example, Petitioners argue that:

> broadband access already serves as a replacement for "a substantial portion of the local telephone exchange service," for in tens of millions of homes, it has replaced the use of traditional local exchange service for narrowband "dial-up" Internet access.[67]

This misses the point. The question is not whether broadband access is a replacement for dial-up Internet access; the question is whether it has replaced local telephone exchange service. Dial-up Internet access represents only a very small portion of usage of the local telephone exchange service, and is used exclusively (or almost exclusively) for information services that are *not subject to CALEA*. It is clear that dial-up Internet access is not a substitute for the local telephone exchange, let alone a replacement. To bring broadband access within the scope of CALEA because it replaces a service that is not subject to CALEA would surely be an incorrect reading of the statute.

More generally, the introduction of an entirely new service does not mean that a pre-existing service has been "replaced." Did television "replace" radio? Did airplanes "replace"

---

[66] 47 U.S.C. § 1001(8)(C)(i).

[67] *Petition* at 24.

ocean liners? What is required is a genuine competitive analysis of whether a new service *actually replaces* an older service.

On the second point, the Commission must have evidence regarding how substantial the replacement of local service has been, and the CALEA legislative history indicates that these data must be analyzed in the context of a particular state or even area code.[68] (This makes sense, since five or ten metropolitan areas may well account for a majority of all wiretaps.) As discussed below, the record evidence on this point is manifestly insufficient.

The "public interest" prong is also critical. The Petition devotes little attention to this requirement, implying that the only public interest consideration is ensuring intercept capabilities. But if Congress intended to raise law enforcement's interests above all others, it would have simply eliminated the public interest test, imposing CALEA obligations on any newcomer whose service became a substantial replacement for local exchange service. To the contrary, the legislative history of CALEA makes clear that the public interest inquiry must be far broader:

> As part of its determination whether the public interest is served by deeming a person or entity a telecommunications carrier for the purposes of this bill, the Commission shall consider whether such determination would promote competition, encourage the development of new technologies, and protect public safety and national security.[69]

---

[68] *CALEA Legislative History* at 3500-01 ("the FCC is authorized to deem other persons and entities to be telecommunications carriers subject to the assistance capability and capacity requirements to the extent such person or entity serves as a replacement for the local telephone service to *a substantial portion of the public within a state*") (emphasis added). Similarly, "telephone exchange service" is defined in section 3(47) the Communications Act to include "service within a telephone exchange, or within a connected system of telephone exchanges *within the same exchange area.*" 47 U.S.C. § 153(47) (emphasis added).

[69] *CALEA Legislative History* at 3501.

The record contains no information suggesting that the proposed expansion of the scope of CALEA would promote competition or encourage new technologies. All of the evidence is to the contrary. Indeed, there is surprisingly little information in the record to suggest that the proposed rulings would even provide a significant amount of protection for public safety or national security, given the small number of wiretaps that seem to have been carried out or attempted in the context of broadband access or telephony.

3. Other Law Enforcement Arguments Do Not Establish Broad Applicability of CALEA to Broadband Access and Broadband Telephony

The Petition also notes that the CALEA definition of "telecommunications carrier" is not explicitly qualified by the phrase "without change in the form or content of the information as sent and received" that is in the Communications Act definition of "telecommunications."[70] However, section 102(8)(C)(i) of CALEA imposes substantially the same limitation by providing that "telecommunications carrier" does not include a provider of information services – *i.e.*, the provider of "a capability for generating, acquiring, storing, *transforming, processing,* retrieving, utilizing, or making available information via telecommunications."[71]

The Petition observes that CALEA does not categorically exclude providers of information services from the definition of "telecommunications carrier," because such providers are only excluded "insofar as they are engaged in providing information services."[72] This argument ignores section 103(b)(2)(A) of CALEA, which categorically states that the intercept

[70] *Petition* at 13-14; 47 U.S.C. § 151(43).

[71] 47 U.S.C. § 1001(6)(A) (emphasis added).

[72] 47 U.S.C. § 1001(8)(C)(i). *See Petition* at 14.

capability requirements "do not apply to . . . information services."[73] Thus, whether or not an information service is being provided by a "telecommunications carrier," CALEA imposes no intercept capability requirements on that service.

Similarly, the Petition manages to find support in the *CALEA Second Report and Order* only by editing out half the sentence that it quotes. What the Commission actually said that "[w]here facilities are used to provide both telecommunications and information services, however, such joint-use facilities are subject to CALEA *in order to ensure the ability to surveil the telecommunications service*."[74] Nothing in this sentence suggests that CALEA imposes any intercept capability requirements on an information service merely because it is being provided over joint-use facilities. At most, CALEA applies only to the telecommunications service being provided over such facilities.

In sum, the Petition fails to establish that the definition of "telecommunications carrier" is substantially broader under CALEA than under the Communications Act. Given that broadband access and most, if not all, broadband telephony services are information services under the Communications Act, it would be clearly inappropriate for the Commission to grant the Petitioners' request for classification of all broadband access and broadband telephony services as subject to CALEA.

B. Analysis of Broadband Access and Broadband Telephony Services Under CALEA Involves Complex Factual Issues

In its arguments to expand the coverage of CALEA, Petitioners largely ignore the complex factual issues that are critical to analysis of broadband access and broadband telephony

[73] 47 U.S.C. § 1002(b)(2)(A).

[74] *CALEA Second Report and Order* at 7119-20 ¶ 27 (emphasis added). The Petition omits the italicized language. *Petition* at 14.

services under CALEA. Important factual issues on which the record in this proceeding is largely barren include the impact of such services on law enforcement, technological details of the services, the extent of deployment of the services, and the effects of imposing CALEA requirements on competition and innovation.

1. Effects of Broadband Access and Broadband Telephony on Law Enforcement Intercepts

The Petition leaves the actual impact on law enforcement of broadband access and broadband telephony almost entirely to generalities. But for purposes of reasoned analysis, specific information is needed. How many intercepts of broadband access have been attempted in the past year? How many have succeeded and how many have failed? What were the reasons for the failures? Could the failures have been avoided by greater technical capability on the law enforcement end? Could equivalent information have been obtained by seeking data upstream or downstream from the entity approached by law enforcement to carry out the tap? The ISP CALEA Coalition's experience suggests that wiretaps of broadband access and telephony are still vanishingly small and that law enforcement's unfamiliarity with the new technology may account for most difficulties in carrying them out.

In place of details, the Petition implies that industry has deliberately shirked its obligations without regard for the consequences to law enforcement.[75] The members of the ISP

[75] *See, e.g.*, *Petition* at 8 ("The ability of federal, state, and local law enforcement to carry out critical electronic surveillance *is being compromised today* by providers who have failed to implement CALEA-compliant intercept capabilities.") (original emphasis); *Petition* at 8 ("Not listing examples of other entities that are deemed to be covered by CALEA in the Commission's rules has in fact emboldened many entities to claim that they and/or their services are not CALEA-covered, and to roll out new services with minimal, if any interception capabilities."); *Petition* at 37 ("As a result, carriers mistakenly qualify for extensions of time based on their own inaction in developing standardized and non-standardized CALEA solution."); *Petition* at 49 ("The Commission should take action to break the seemingly endless cycle of packet-mode extensions, and remove the extension expectancy/entitlement held by some, carriers.").

CALEA Coalition are disturbed by this charge – given their commitment to assisting law enforcement, including working well beyond the level of effort required by law. Industry groups have made numerous efforts to meet with the FBI to understand in more detail the nature of the difficulties that law enforcement has experienced, and the FBI has simply not been prepared to have such a meeting, even in confidence. At the same time, however, there is some reason to believe that Petitioners have been providing more detailed information in *ex parte* briefings to members of the Commission and staff. Although the ISP CALEA Coalition recognizes the difficulty of putting such matters on the public record, we urge that the Commission take care that all sides to be heard when the compliance of industry is questioned. Without an open exchange of views, misunderstandings of the facts – perhaps held in good faith by Petitioners – could become the basis of Commission policy.

2. Technological Diversity of Broadband Access and Broadband Telephony Services

Equally lacking in detail is the description of the actual technologies that Petitioners intend to cover in the proposed ruling. As discussed above, even Petitioners are unclear about something as basic as whether e-mail is covered by the ruling it seeks. To reach a reasoned decision, the FCC must understand the widely varying technical architectures of broadband access and broadband telephony services. For broadband telephony, the Petition simply identifies three "business models" in a lengthy footnote.[76] These models are simplified, and do not address the substantial technical variation that is possible within each model, or the other models that are possible. For broadband access, the Petition provides no service detail at all, stating only:

[76] *Petition* at 16-17 n.39.

> "Broadband access services" includes the platforms currently used to achieve broadband connectivity (*e.g.*, wireline, cable modem, wireless, fixed wireless, satellite, and power line) as well as any platforms that may in the future be used to achieve broadband connectivity.[77]

Each current broadband access medium can support numerous different service models and technical protocols.

Accordingly, the Commission should require Petitioners to identify with technical particularity the services that it believes should be covered by CALEA, and should provide an opportunity in the rulemaking proceeding for service providers to respond to such specific requests. It is simply not practical for service providers to provide a reasoned factual response to the vague and overbroad requests in the Petition.

3. Deployment of Broadband Access and Broadband Telephony and Public Interest Under the "Substantial Replacement"Test

Far more factual development is required as well on the question whether any form of broadband telephony is "a replacement for a substantial portion of the local telephone exchange service" and whether it is "in the public interest" for the services to be subject to CALEA.[78] To make a determination on the "substantial replacement" issue, the Commission would require market data on deployment of particular services. For example, available data suggest that leading VoIP telephony provider Vonage has only about 125,000 subscribers[79] – approximately

[77] *Id.* at 16.

[78] 47 U.S.C. § 1001(8)(B)(ii). *See* section III.A.2 above.

[79] *See* http://www.vonage.com/corporate/aboutus_fastfacts.php (last visited April 8, 2004).

0.1% of the overall U.S. telephony market.[80] Furthermore, as discussed above, the CALEA legislative history indicates that such data must be analyzed at the state or area code level.

Thus, the Commission should require Petitioners to identify services that it believes have replaced "a substantial portion of the local telephone exchange service," and to provide statistical evidence of intercept requirements for such services (submitted on a confidential basis to the extent appropriate). The Commission should also invite service providers to supply evidence in this area, and should invite all parties to the proceeding to submit comments on the associated "public interest" issues, including evidence of the effects of CALEA on competition and innovation.

C. Any Commission Action on Broadband Access and/or Broadband Telephony Requires a Notice and Comment Rulemaking

Because of these factual deficiencies and because of the difficult legal issues presented by the Petition, the Commission should not reach any decision on the applicability of CALEA to broadband access and broadband telephony services through a declaratory ruling, as the Petition requests.[81] The Commission must do so, if at all, only through a notice and comment rulemaking.

Although the decision whether to proceed by rulemaking or adjudication (including a declaratory ruling) lies within the Commission's discretion,[82] that discretion is not limitless. There is simply nothing "adjudicative" about this proceeding. To issue a declaratory ruling in

---

[80] FCC, News Release, *Federal Communications Commission Releases Study on Telephone Trends*, at 2 (Aug. 7, 2003) (reporting that 104 million households had telephone service as of November 2002).

[81] *Petition* at 15.

[82] *See, e.g., NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 292-94 (1974) (discussing distinction between "quasi-legislative" rulemaking and "case-by-case" adjudication); *SEC v. Chenery Corp*., 332 U.S. 194 (1947).

this context would serve no purpose other than to evade the requirements of notice and comment. Petitioners cite "delay[]" as reason for the Commission to issue a declaratory ruling.[83] But given the excellent record of compliance by ISPs and other carriers with requests for cooperation in the context of Internet and other packet-mode services, there is no reason to believe that following a rulemaking process will materially impair the ability of Petitioners to investigate crime.

The Commission has, on a number of occasions, explained the circumstances under which it will issue a declaratory ruling, and the circumstances under which it will find a rulemaking preferable. The Commission has also found that "[t]he presence or absence of factual disputes is a significant factor in deciding whether a declaratory ruling is an appropriate method for resolving a controversy."[84] As discussed above, not only are relevant facts in this proceeding disputed, but the factual specificity of the Petition is so limited that it is not even possible to determine which facts are at issue. The Commission also takes into consideration whether there are serious disputes regarding the applicable law.[85] As explained at length above, there are fundamental disagreements between Petitioners and industry as to the scope of CALEA. Furthermore, the Commission's decisions will affect a large number of parties who offer a wide variety of products and services. The Commission has stated, in similar circumstances:

> In view of its far reaching implications, we would prefer to address these questions in the context of a single application rather than on an ad hoc basis. The very nature and complexity of the issues that must be addressed, their basic

[83] *Petition* at 22 ("Without such a preliminary determination from the Commission, Law Enforcement remains deeply concerned that development of interception capabilities regarding these services will continue to be delayed – to the further detriment of effective law enforcement – while the outcome of this proceeding is debated.").

[84] *Access Charge Reform*, 14 FCC Rcd 14,221, 14318-19 (1999).

[85] *Id.*

> impact on the overall structure of the international telecommunications industry and the number of parties interested in the outcome compel us to conclude that the questions raised by the petitioners should be considered in a broad rulemaking proceeding.[86]

Likewise, in this proceeding, Commission precedent points unquestionably to a rulemaking.

D. Industry Standards Processes Will Define the Capability Requirements for Any Broadband Access or Broadband Telephony Services Covered by CALEA

Once the Commission has clarified in a rulemaking which broadband access and broadband telephony services (if any) are subject to CALEA, industry will have the task of defining safe harbor compliance standards pursuant to Section 107 of CALEA. The legislative history explains that this section "established a mechanism for implementation of the capability requirements that defers, in the first instance, to industry standards organizations."[87] Likewise, Petitioners recognize on the AskCALEA website that "CALEA already permits [broadband] service providers to fashion their own technical standards as they see fit."[88] This deference to industry is a key feature of CALEA implementing the statutory goal "to avoid impeding the development of new communications services and technologies."[89]

---

[86] *Aeronautical Radio, Inc.*, 77 F.C.C.2d 535 (1980); *See also Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States,* 15 FCC Rcd. 7207, 7219 n. 43 (1999) ("[T]he Commission has declined to issue a declaratory ruling when facts were disputed or not clearly developed."); *American Network, Inc., Petition for Declaratory Ruling Concerning Backbilling of Access Charges,* 4 FCC Rcd 550 (Com. Car. Bur. 1989) (same).

[87] *CALEA Legislative History* at 3506.

[88] http://www.askcalea.net/jper.html#fmq (last visited Apr. 1, 2004).

[89] *CALEA Legislative History* at 3493.

The industry standards process for packet-mode communications already is well under way. For instance, the PacketCable Electronic Surveillance standard is now in its third version.[90] In addition, J-STD-025B, a joint packet-mode CALEA standard developed by the Telecommunications Industry Association and Committee T1 of the Alliance for Telecommunicatons Industry Solutions, has been completed and is expected to become an ANSI[91] standard at the close of the ANSI balloting process in May 2004.[92] It would be premature for there to be any involvement by the Commission in these standards processes; and indeed the Petition does not challenge the content of any specific packet-mode standard.

Although the specific nature of CALEA capability requirements is for these reasons outside the scope of this proceeding, some comment on these issues here is appropriate – including because the nature of such requirements cannot be separated entirely from the question of defining which service providers are subject to CALEA. The fundamental limitations on the capability requirements under section 103 of CALEA are that call-identifying information must only be provided to the extent it is "reasonably available"[93]; and that all capability requirements are limited to the extent they are not "reasonably achievable."[94]

---

[90] CableLabs®, *PacketCable™ Electronic Surveillance Specification*, PKT-SP-ESP-I03-040113 (Jan. 13, 2004), *available at* http://www.packetcable.com/downloads/specs/PKT-SP-ESP-I03-040113.pdf (last visited Apr. 10, 2004).

[91] "ANSI" stands for American National Standards Institute, a non-profit organization that administers and coordinates the U.S. standards and conformity assessment system. *See* http://www.ansi.org (last visited Apr. 9, 2004).

[92] It is clear that there has been no "fail[ure] to issue technical requirements or standards" that would give the FCC standard-setting authority under Section 107(b) of CALEA, 47 U.S.C. § 1006(b). To the extent that there have been some delays in industry standard-setting to date, this is to a significant extent due to the intransigence of Petitioners.

[93] 47 U.S.C. § 1002(a)(2).

[94] 47 U.S.C. § 1008(b).

The FBI "needs" documents for broadband access[95] and broadband telephony[96] are manifestly inconsistent with these statutory requirements. Significantly, the PIPNAS Needs Document requires any provider of broadband access services to "break open" IP packets and provided detailed information from packet headers.[97] However, many providers of broadband access services simply offer a pipe for transmitting IP packets, and have no reason or capability to process disaggregated packet header information. This information typically is not "reasonably available" to such service providers, and to provide it would require major reengineering that may not be "reasonably achievable." More generally, it is such detailed and unjustified requests for call-identifying information that have led to most of the major disputes between Petitioners and industry standards-setting bodies throughout the CALEA implementation process.

Even if capability requirements are defined in a more limited fashion than Petitioners have requested in the 'needs' documents, Petitioners would still have the ability to intercept broadband access and broadband telephony services through an appropriate combination of Title III intercept orders and pen register orders, CALEA-mandated intercept capabilities, and technological solutions developed by law enforcement (*e.g.*, DCS-1000). This result flows from the sensible balance that Congress struck in CALEA between the interests of law enforcement, and those of industry and consumers. CALEA simply does not require greater burdens on ISPs and other carriers.

---

[95] Electronic Surveillance Needs for Public IP Network Access Service (PIPNAS) (Sept. 30, 2003) ("*PIPNAS Needs Document*").

[96] Electronic Surveillance Needs for Carrier-Grade Voice over Packet (CGVoP) Service (Jan. 29, 2003).

[97] *PIPNAS Needs Document*, *passim*.

V. THERE IS NO BASIS FOR A RULEMAKING ON APPLICABILITY OF CALEA TO FUTURE SERVICES

The Petition also requests the Commission to establish rules and procedures for so-called "easy and rapid identification of future CALEA-covered services and entities."[98] Petitioners go so far as to suggest a pre-approval process for new services:

> In the event that a carrier plans to begin offering a new service and is unsure whether that service is subject to CALEA, the Commission should require the carrier to file a request for clarification or declaratory ruling that seeks Commission guidance on CALEA's applicability to the proposed service offering.[99]

This suggestion is breathtaking, both in its contradiction of Congress's plain instructions and in the devastating impact it would have on innovation and on the competitive position of U.S. companies in international technology markets. Such a regulatory pre-approval process would impose the cost of building wiretap capabilities into new technologies even before it is clear whether they will succeed, as well as the substantial costs of delay in fast-moving technology markets – and these costs would be particularly damaging for the small and start-up companies that have historically driven much of technological innovation.[100]

One of three central purposes of CALEA (along with law enforcement assistance and protection of privacy) is "to avoid impeding the development of new communications services

---

[98] *Petition* at 33; *see generally id.* at 33-34, 53-54.

[99] *Id.* at 54.

[100] Petitioners actually state that the proposed pre-approval requirement "will benefit" carriers because it is more "cost-effective." *Petition* at 54 n.81. This suggestion reflects a deep misunderstanding of how technological development takes place in an entrepreneurial market.

and technologies."[101] Furthermore, section 103(b) of CALEA makes clear that Petitioners may not "require any specific design of equipment or facilities, services, features, or system configurations," and may not "prohibit the adoption of any equipment facility, service, or feature by any provider of a wire or electronic communication service."[102]

The request of Petitioners for presumptive rules for future services would stand the statutory process on its head. Deciding how to apply a decades-old wiretap formula to new technologies that do not yet exist would be an exercise in speculation. In particular, application of vague, general rules like those proposed by Petitioners[103] would create substantial uncertainty and produce a chilling effect on development of new technologies – rather than leaving innovators free to innovate.[104] This is exactly opposite to what Congress intended. Accordingly, the Commission should firmly reject Petitioners' request for a rulemaking on this issue.

---

[101] *CALEA Legislative History* at 3493. *See also id*. at 3499 ("The Committee's intent is that compliance with the requirements in [CALEA] will not impede the development and deployment of new technologies.").

[102] *See also id.* at 3499 ("The bill expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies … . This is the exact opposite of the original versions of the legislation, which would have barred introduction of services or feature that could not be tapped."); *August 11, 1994 Hearing* at 115-16 (statement of Louis J. Freeh) ("As I have said on numerous occasions, law enforcement has no intention of becoming a technology Czar or of regulating the development of new and beneficial telecommunications systems, services or features.")

[103] *See Petition* at 33-34 ("Such rules, at a minimum, should provide that (1) a service that directly competes against a service already deemed to be covered by CALEA is presumptively covered by CALEA pursuant to Section 102(8)(A) of CALEA; (2) if an entity is engaged in providing wire or electronic communication switching or transmission service to the public for a fee, the entity is presumptively covered by CALEA pursuant to Section 102(8)(A) of CALEA; and (3) a service currently provided using any packet-mode technology and covered by CALEA that subsequently is provided using a different technology will presumptively continue to be covered by CALEA.").

[104] *See, e.g., Kropp Forge Co. v. Secretary of Labor*, 657 F.2d 119, 122-24 (7th Cir. 1981) (striking down an OSH standard for vagueness); *Georgia Pacific Corp. v. Occupational Safety and Health Review Commission*, 25 F.3d 999, 1004-06 (11th Cir. 1994) (same).

Of course, CALEA may well apply to some future technologies. But the application of CALEA to such technologies must proceed as set out in the statute – via industry standards and individual initiative, sobered by the prospect of having to defend the result in a civil enforcement action brought by Petitioners. The future development of American communications technology must not depend on advance permission from law enforcement.

VI. THERE IS NO BASIS FOR A RULEMAKING ON CALEA ENFORCEMENT

The Petition also requests that the Commission issue strict rules on CALEA enforcement. First, Petitioners propose that the Commission require a forced march to CALEA packet mode "compliance" by June 2005, with deadlines for issuance of industry standards and compliance along the way.[105] Second, Petitioners request that the Commission specify the type of enforcement actions that it can take in cases of non-compliance with CALEA.[106] There is no statutory basis for the Commission to do either of these things.

The Supreme Court has stated that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."[107] Section 108 of CALEA places enforcement in the hands of the federal courts. This enforcement authority is strictly confined, and may be exercised only if the court finds that "alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception" *and* "compliance with the requirements of [CALEA] is reasonably achievable."[108] Section 108 also imposes

---

[105] *Petition* at 34-53.

[106] *Id.* at 58-63.

[107] *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). *See also American Bus Ass'n v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000) (same).

[108] 47 U.S.C. § 1007(a).

restrictions regarding the relief that a court may order, and the timing of compliance with such an order.[109] A court has no power to broadly "outline the types of enforcement action that may be taken against carriers"[110] as the Petition requests. As in any judicial proceeding, a CALEA enforcement action under Section 108 requires that a court find facts that establish violation of the relevant statutory standards.[111]

Given the strict standards for judicial relief and carriers' history of good faith in compliance with law enforcement requests for wiretap assistance, it is unsurprising the Petitioners have *never once* (so far as the members of the ISP CALEA Coalition are aware) sought court enforcement under section 108 of CALEA. Instead, Petitioners are asking the FCC to construct a new, non-statutory enforcement framework to lower the bar for enforcement. There is no basis for this request.

Petitioners claim that the Congressionally-mandated "CALEA implementation process … is not working,"[112] but in fact the prospect of eventually facing civil enforcement has induced many companies to adopt intercept solutions even for technologies that may not be covered by CALEA. Thus, while the status of VoIP telephony under CALEA remains hotly contested in this very proceeding, providers of cable telephony have adopted a series of standards for providing intercept capability, and softswitch makers have also added intercept features to their

---

[109] 47 U.S.C. § 1007(b), (c).

[110] *Petition* at 58.

[111] The fact that CALEA enforcement is exclusively judicial is confirmed by 18 U.S.C. § 2522, which provides authority for court enforcement of CALEA in connection with intercept orders and for civil penalties for CALEA violations, in both cases subject to a requirement that any action be "in accordance with section 108 of [CALEA]."

[112] *Petition* at 38.

broadband telephony products.[113] That is a regulatory failure only if one believes that Petitioners are entitled to decide every detail of an intercept solution before it is adopted and to demand changes no matter what they cost industry and consumers.

The enforcement requests of Petitioners are also inconsistent with the specific and limited authority delegated to the Commission. Commission authority under CALEA is limited to clearly defined areas:

- including and excluding certain types of entities from the definition of "telecommunications carrier" (Section 102(8)(B)(ii), (C)(ii));
- issuing regulations regarding carrier security (Section 105);
- resolving standards disputes (Section 107(b));
- acting on extension requests (Section 108(c)); and
- determining whether compliance is reasonably achievable (Section 109(b)(1)).

Petitioners cite section 229 of the Communications Act[114] as the source of authority for the various aspects of the proffered enforcement scheme. Section 229 cannot carry the weight that Petitioners place on it. Section 229 authorizes the Commission to prescribe "such rules as are necessary to implement the requirements of [CALEA]." This is not a general grant of authorization to the Commission to ignore the text of CALEA. Quite obviously, a rule that conflicts with the statutory scheme could not possibly be "necessary" to implement its requirements. Petitioners effectively read section 229 as a delegation to the Commission of limitless power with respect to CALEA, in contradiction of the expressly limited powers

---

[113] CableLabs®, *PacketCable™ Electronic Surveillance Specification*, PKT-SP-ESP-I03-040113 (Jan. 13, 2004), *available at* http://www.packetcable.com/downloads/specs/PKT-SP-ESP-I03-040113.pdf (last visited Apr. 10, 2004); International Packet Communications Consortium, *Lawfully Authorized Electronic Surveillance for Softswitch-based Networks* (July 3, 2003) *available at* http://www.softswitch.org/dms/show_content.asp?id=578&window=www.softswitch.org/dms/documents/public/578.pdf (last visited April 10, 2004).

[114] 47 U.S.C. § 229.

contained in the text of the Act itself.[115] Furthermore, where Congress has separately delegated CALEA enforcement power, it has been quite explicit about that delegation – *i.e.*, in 18 U.S.C. § 2252, which provides authority for courts to enforce CALEA in connection with intercept orders and to assess civil penalties for CALEA violations.

It is a fundamental precept of administrative law that "an agency literally has no power to act … unless and until Congress confers power upon it."[116] By specifying the powers of the Commission under CALEA, "Congress effectively has provided a 'who, what, when, and how' laundry list governing the [Commission's] authority."[117] The D.C. Circuit has categorically

---

[115] In *Implementation of Video Description of Video Programming,* Report and Order, 15 F.C.C.R. 15,230, 15,276 (2000), Chairman Powell, in a dissenting opinion, discussed an analogous provision of Communications Act, stating:

> It is important to emphasize that section 4(i) is not a stand-alone basis of authority and cannot be read in isolation. It is more akin to a 'necessary and proper' clause. Section 4(i)'s authority must be 'reasonably ancillary' to other express provisions. And, by its express terms, our exercise of that authority cannot be 'inconsistent' with other provisions of the Act. The reason for these limitations is plain: Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would expand greatly its regulatory reach.

In *MPAA v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002), the D.C. Circuit adopted Chairman Powell's view, specifically incorporating the language quoted above.

[116] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

[117] *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 667 (D.C. Cir. 1994) (en banc). *See also Independent Insurance Agents of America, Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000) ("[W]here the context shows that the mention of one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives, the canon [of *expressio unius est exclusio alterius*] is a useful aid.") (internal quotations omitted).

dismissed the idea that an agency "possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area."[118]

Under these principles, the Commission has no authority to act on the Petition's request for a deadline-driven forced march to packet-mode "compliance." The Commission does have authority under Section 108(c) to decide whether to extend packet mode compliance deadlines; and in fact it has not acted on any requests for extension beyond the current deadline of January 30, 2004. Since that deadline is past, certain CALEA packet-mode compliance obligations are in force. Providers of packet-mode telecommunications services that are subject to CALEA may either comply with the interim standard approved in the Commission's *CALEA Third Report and Order* (which permits delivery of the entire packet stream),[119] or with one of the other packet standards that have been developed or are under development. Petitioners could theoretically pursue court action under section 108 of CALEA to enforce such compliance (although the ISP CALEA Coalition does not believe that such action would be justified against its members). But neither Petitioners nor the Commission are empowered to rewrite the law to provide a substitute enforcement mechanism.

---

[118] *Railway Labor Executives' Ass'n*, 29 F.3d at 670. Similarly, the Commission does not have the general power to decide whether particular entities are "telecommunications carriers" subject to CALEA, except to the extent that the power has been specifically delegated to the Commission, such as section 102(8)(B)(ii)'s delegation to the Commission the power to "find[] that [a] service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title[.]"

[119] 14 FCC Rcd 16794, 16819 ("we find that packet-mode communications, including call-identifying information and call content, may be delivered to law enforcement under the interim standard").

VII. CONCLUSION

For the reasons set out above, the ISP CALEA Coalition requests that, in any rulemaking on CALEA, the Commission affirm the broad scope of the information services exception to CALEA – including its applicability to the core online, e-mail and other messaging services of ISPs. The Commission should not issue a declaratory ruling on the applicability of CALEA to broadband telephony and broadband access, but should likewise consider this issue in any rulemaking, based upon a complete factual record. Finally, the Commission should reject the requests of Petitioners for rulemaking under CALEA on pre-approval of new technologies and new, non-statutory enforcement procedures.

Respectfully submitted,

ISP CALEA Coalition

Of Counsel:

Stewart A. Baker
Maury D. Shenk
John D. Clopper
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Tel: (202) 429-3000

Dated: April 12, 2004